No. 93-1660

In The

# Supreme Court of the United States

October Term, 1994

STATE OF ARIZONA,

*Petitioner,*

v.

ISAAC EVANS,

*Respondent.*

On Writ Of Certiorari
To The Supreme Court Of Arizona

## BRIEF OF RESPONDENT

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32 pp

## QUESTION PRESENTED

Where evidence has been seized incident to an arrest based upon a police computer record of an open warrant that had actually been quashed 17 days earlier, does the exclusionary rule require suppression of the evidence regardless of whether police personnel or court personnel were responsible for the quashed warrant's continued presence in the police computer record?

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## OPINIONS BELOW

The opinion of the Supreme Court of Arizona is reported at 177 Ariz. 201, 866 P.2d 869 (1994). (Appendix to the Petition, hereinafter, Pet. App. at 1a.) The opinion of the Arizona Court of Appeals is reported at 172 Ariz. 314, 836 P.2d 1024 (Ct. App. 1992). (Pet. App. at 22a.)

## JURISDICTION

Jurisdiction pursuant to 28 U.S.C. § 1257 is not properly invoked. No federal question was pressed or passed upon by the Arizona Court of Appeals or the Arizona Supreme Court. Arizona's good faith exception statute, A.R.S. § 13-3925, upon which the Arizona Court of Appeals based its decision, provides an independent non-federal ground. (Pet. App. at 35a-37a).

## CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

### I. The arrest.

Isaac Evans turned the wrong way onto a one-way street. (Joint Appendix page 17, hereinafter, J.A. 17.) Unfortunately for Evans, this portion of the one-way street happened to be in front of the main police station in Phoenix, Arizona. (J.A. 16.) Not surprisingly, there were a number of officers in the area. Officer Sargent, who was parked in front of the police station doing his paperwork, activated his lights and made a U-turn to stop Evans' vehicle. (J.A. 16, 17.) Seventeen days earlier, Evans had appeared in justice court on a bench warrant for failure to appear on some traffic tickets. The justice of the peace quashed the warrant. (J.A. 29.) However, through no fault of Evans, the quashed warrant was not removed from the police computer; therefore, when the arresting officer did a "wants and warrants" check, the computer reported a "hit" which reflected an active misdemeanor warrant. (J.A. 19.) Phoenix Police Officer Sargent then took Evans to the police car where the officers searched him and handcuffed him. (J.A. 19.) As the officer attempted to place the cuffs on Evans, a hand-rolled cigarette fell to the ground. (J.A. 20.) In a subsequent search of Evans' car, the officers found a baggie of marijuana under the passenger seat. (J.A. 22.) Evans was taken into custody. Had the computer not indicated an active warrant for Evans' arrest, the officer would have written a citation for driving on a suspended license and sent Evans on his way. (J.A. 24.)



### II. The suppression hearing.

The defense moved to suppress the evidence which had been seized following arrest pursuant to a nonexistent warrant. (J.A. 5.) The defense argued that the "good faith" exception to the exclusionary rule would not apply because it was police error, not judicial error, which caused the invalid arrest. (*Id.*)

At the suppression hearing, the State called not only the arresting officer, but also the chief clerk of the justice court which had quashed the warrant and a records clerk from the sheriff's office. The ordinary procedure when a warrant has been quashed in the justice court is that one of three clerks will call the warrant section of the sheriff's office advising that the warrant has been quashed and should be removed from the computer. (J.A. 29.) A notation in the file memorializes that the call was made. (J.A. 31.) There was no notation on Evans' file; however, the chief clerk was unable to say whether a call had not been made or whether, a call having been made, someone simply failed to make a notation. (J.A. 32.) It was not the chief clerk's responsibility to make the call and the State did not call as witnesses any of the three clerks who were responsible in order to ascertain whether or not any of them had made the call. (J.A. 32.) The records clerk from the sheriff's office, who worked in the OIC (Operations Information Center), testified that there was no notation on the sheriff's warrant recall list on the basis of which warrants are removed from the computer. (J.A. 41.) The clerk was unable to say whether a call had not been received from the justice court or whether a call was received but the clerk failed to make a notation on the recall list. (J.A. 43.)

The chief clerk of the justice court testified that when, on January 7th (two days after Evans was arrested), the justice court received notice that Evans had been arrested under their warrant, they immediately called the jail and faxed a copy of the release order. (J.A. 30.)

The trial court did not decide whether justice court personnel or sheriff's personnel were responsible for the failure to delete the warrant from the computer. The court held that regardless of whether the fault lay with the police department or a justice court clerk, "it is the State's fault." (J.A. 52.) The motion to suppress was granted and the State appealed.

**III. Preservation of the question.**

The motion to suppress filed by Mr. Evans' public defender in the trial court was based upon the Fourth Amendment. (J.A. 2.) However, except for the dissenting opinion in the Arizona Supreme Court, this was the last time the Fourth Amendment was even mentioned in this case until the State of Arizona raised it before this Court in the petition for certiorari. The State's response to the motion to suppress does not mention the Fourth Amendment. It does, however, argue that the officer acted in good faith pursuant to the Arizona good faith statute, A.R.S. § 13-3925. (J.A. 8-11.) During the entire suppression hearing, which is set forth in the Joint Appendix at pages 14 through 54, there is no mention of the Fourth Amendment. In making his ruling, the trial court judge merely stated: "Motion to Suppress is granted." (J.A. 53.)

The State's opening brief filed in the Arizona Court of Appeals says nothing about the Fourth Amendment.



(J.A. 55-61.) Nor is there anything about the Fourth Amendment in the answering brief filed by the defense. (J.A. 62-66.) Nor in the reply brief. (J.A. 67-70.) When Division One of the Arizona Court of Appeals reversed the trial court, it said not a word about the Fourth Amendment. (Pet. App. at 22a-40a.)

Evans filed a petition for discretionary review by the Arizona Supreme Court in which he made no mention of the Fourth Amendment. (J.A. 71-75.) In the State's response to Evans' petition for review, again, there is no mention of the Fourth Amendment. (J.A. 76-79.) The decision of the Arizona Supreme Court which reinstated the trial court's suppression order does not mention the Fourth Amendment. (Pet. App. at 1a-21a.) The dissent by a single member of the Arizona Supreme Court does mention the Fourth Amendment but this was the first time that it had been mentioned since the public defender filed the motion to suppress three years before.

## SUMMARY OF ARGUMENT

The issue in this case is whether, in making an arrest, police officers may rely on their own computer's erroneous report when there is no warrant in existence.

Although propriety of exclusion under the Fourth Amendment was not pressed or passed upon in the Arizona courts, the result reached was fully in accord with Fourth Amendment jurisprudence.

Evans' arrest was completely without legal basis. There was no arrest warrant in existence nor was there probable cause or exigent circumstance.

The State of Arizona has conceded that, when Evans was arrested based merely upon the presence of a phantom warrant which existed only in the police computer, a Fourth Amendment violation occurred. Therefore, in the absence of some exception, suppression was proper. And no exception was justified.

There was no independent judicial determination by a judge or magistrate that Evans should be arrested and that, therefore, a warrant should issue. On the contrary, a justice of the peace had decided, based upon Evans' appearance in justice court seventeen days before, that the warrant previously issued by another judge should be quashed. Thus, *Leon*'s narrow exception to the exclusionary rule does not apply. *United States v. Leon*, 468 U.S. 897 (1984). The police here did not reasonably rely on a judicial error, they relied instead on a *police* computer error.

The deterrence purpose of the exclusionary rule is properly served when it provides an incentive to police to ensure the accuracy of their computer information systems. Exclusion of the evidence seized following Evans' illegal arrest also serves to preserve the judicial integrity of our courts and the public perception of courts and officers as law-abiding. The subjective reliance of the arresting officers based upon the computer report of a nonexistent warrant was not sufficient just as such reliance on a radio bulletin was insufficient in *Whiteley*. *Whiteley v. Warden*, 401 U.S. 560 (1971). Because there was



no warrant in existence to justify Evans' arrest, exclusion was the only proper decision under Fourth Amendment law.

Before they are given authority to arrest based upon computer information, law enforcement agencies, who, at the present time, are the only entities who can access criminal information systems, have the responsibility to ensure the accuracy of their computer systems and to provide fail-safe mechanisms to avoid illegal arrests. When law enforcement authorities do not, they cannot claim good faith reliance.

The Arizona Supreme Court should be affirmed.

## ARGUMENTS

### I. The jurisdiction of this Court is not properly invoked.

This Court lacks jurisdiction; the petition should be dismissed as improvidently granted.

#### A. The federal question was not pressed or passed upon in the state courts.

Certiorari jurisdiction over state court decisions derives from 28 U.S.C. § 1257. This section requires that a federal question be "set up or claimed" in the state court. Therefore, if the State of Arizona wished to bring a federal question here through certiorari, it had the obligation to preserve the question through Arizona appellate courts. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3

(1983). Because the State did not raise the Fourth Amendment issue at every level of the Arizona judicial system, it should not be permitted to do so here. *Illinois v. Gates*, 462 U.S. 213, 220 (1983). Nor did the State ever suggest (as amici have) that the federal exclusionary rule should be modified. (In fact, the State argued in its opening brief that the state's exclusionary rule, A.R.S. § 13-3925, governed.) (J.A. 61.) In *Gates*, the court said that modification of the exclusionary rule is not "so connected with" the substantive Fourth Amendment issue as to justify an argument for modification which has not been "pressed or passed upon below." *Gates*, 462 U.S. at 223. Finally, the Fourth Amendment issue was not "passed upon" by the Arizona Supreme Court which never mentioned it. The court decided that, in a free society, a person should not be subject to arrest because of a computer error caused by the government:

> It is repugnant to the principles of a free society that a person should ever be taken into police custody because of a computer error precipitated by government carelessness. (Pet. App. at 10a.)

**B. The matter was decided on independent non-federal grounds.**

In the opening brief filed before the Arizona Court of Appeals, the State urged that it was entitled to prevail under Arizona's good faith statute, A.R.S. § 13-3925. (J.A. 61.) The Arizona Court of Appeals agreed holding that: "Under Arizona's good faith exception statute [A.R.S. § 13-3925], we find that neither the arresting officers nor



the Phoenix Police Department were negligent in arresting Evans or in searching his person." (Pet. App. 35a-37a.) The Arizona Supreme Court, in vacating the appellate court's decision and affirming the trial judge's decision to suppress, discussed the Arizona good faith statute, A.R.S. § 13-3925, and rejected the State's arguments:

> The arrest was not the result of "a reasonable judgmental error" concerning facts which might constitute probable cause. A.R.S. § 13-3925(C)(1). It was the result of negligent record keeping. * * * This is also not a cause involving a mere "technical violation." A.R.S. § 13-3925(C)(2). Defendant was arrested on the basis of a nonexistent warrant, not one that was "later invalidated due to a good faith mistake." (Pet. App. 7a, 8a.)

Regarding *Leon*, the Arizona Supreme Court responded to the dissent (not the State, which had never raised it) that *Leon* was not "helpful." *United States v. Leon*, 468 U.S. 897 (1984). (Pet. App. 6a.) Noting "the potential for Orwellian mischief" created by government carelessness in keeping its computers error free, the Arizona Supreme Court found a distinction without a difference in whether court clerks or police clerks are responsible.

**C. Remand for State clarification.**

If there remains a doubt as to whether a federal question was decided by the Arizona Supreme Court, this Court should remand for State clarification. That clarification could be as to the basis of the decision, federal or

state, and, if necessary, a factual finding, should this Court feel that it is necessary to decide whether sheriff or justice court employees were responsible.

Although the Fourth Amendment issue was not argued before or decided by the state court, the matter was correctly decided under Fourth Amendment jurisprudence as set forth below.

## II. The Fourth Amendment and the purposes of the exclusionary rule require suppression of the evidence seized after an arrest based upon an erroneous police computer record indicating an active warrant.

### A. The Fourth Amendment requires suppression of the evidence seized.

There was no legal basis for this arrest, warrant or probable cause. Evans was arrested solely because the police computer reported a nonexistent warrant. The officer would not have arrested Evans for driving on a suspended license; the sole basis for the arrest was the phantom warrant. The issue here is whether police may rely on their own computer's erroneous report where there is no warrant at all.

Petitioner and amici argue that the evidence seized following the arrest should not have been excluded because the arresting officer acted in good faith. Good faith is not enough. An arrest without a warrant to support the search incident to arrest must be made with probable cause. *See Henry v. United States*, 361 U.S. 98



(1959) and cases cited therein at 102. As stated by this Court in *Beck v. Ohio*, 379 U.S. 89, 97 (1964):

> If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects" only in the discretion of the police.

*See also Terry v. Ohio*, 392 U.S. 1, 22 (1968).

The petitioner, the State of Arizona, has conceded a Fourth Amendment violation. (Petitioner's Brief at 10.) Therefore, in the absence of some exception, the Arizona Supreme Court properly suppressed in the exercise of its duty to give "force and effect" to the constitutional provision. *Weeks v. United States*, 232 U.S. 383, 392 (1914). *See also Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) in which Justice Holmes wrote that to do otherwise would reduce "the Fourth Amendment to a form of words." 251 U.S. at 392. Justice Day wrote in *Weeks* that:

> The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. 232 U.S. at 393.

In 1959, Justice Douglas wrote in *Henry v. United States* that:

> It is better, so the Fourth Amendment teaches, that the guilty go free than that citizens be subject to easy arrest. 361 U.S. 98, 104.

In short, there is "nothing new in the realization that the constitution sometimes insulates the criminality of a

few to protect the privacy of us all." *Arizona v. Hicks*, 480 U.S. 321, 329 (1987).

### B. Suppression serves the purposes of the exclusionary rule.

In recent years, courts have focused on police deterrence as the primary purpose of the exclusionary rule. In order to deter police from unreasonable searches and seizures not based upon probable cause, the courts have required that a magistrate's scrutiny and determination be interposed before any intrusion is justified under the Fourth Amendment. Therefore, courts require the police to obtain the approval of a judge or magistrate. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The court in *Coolidge* quoted the "classic statement of policy underlying the warrant requirement" made by Justice Jackson writing in *Johnson v. United States*, 333 U.S. 10, 13, 14 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. * * * When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. *Coolidge*, 403 U.S. at 449.



Thus, in *Elkins*, 364 U.S. 206, 217, the court spoke of "removing the incentive to disregard the constitutional guarantee" and in *Terry* "limitations . . . to limit the quest itself." 392 U.S. 1, 29.[1]

When police officers reasonably rely upon a warrant which is later determined to have been issued pursuant to a judicial error (and the judge has not been misled by a police officer), the deterrence purpose of the exclusionary rule is not served and the evidence is admissible. *United States v. Leon*, 468 U.S. 897 (1984). The *Leon* exception is, however, a narrow one. Subjective good faith is not enough. And if the police authority in general is responsible (through negligence or deliberate conduct) for the misinformation on which the arresting officer relies, a Fourth Amendment violation has occurred and the evidence will be excluded. *Leon*, 468 U.S. at 922, 923.

The Arizona court's decision in *Evans* serves the deterrent purpose of the exclusionary rule in that it discourages the police authorities from negligent maintenance of their computer information systems. As Justice Zlaket of the Arizona Supreme Court wrote in the decision:

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[1] The need to protect constitutional rights from assault by overzealous policemen and police organizations is amply demonstrated by the amicus briefs in which it becomes clear that, not only have the police not learned the lessons of this Court's Fourth Amendment decisions, they continue to chafe against the Fourth Amendment's very existence with arguments that this Court's insistence on Fourth Amendment protections will "induce . . . police . . . disrespect for the law" and "penalize law enforcement." Brief for Washington Legal Foundation pages 21, 28.

> It is useful and proper to [invoke the exclusionary rule] where negligent record keeping (a purely clerical function) results in an unlawful arrest. Such an application will hopefully serve to improve the efficiency of those who keep records in our criminal justice system. (Pet. App. at 9a.)

Exclusion of the evidence seized following Evans' unlawful arrest also serves to preserve the judicial integrity of the courts, a secondary purpose of the exclusionary rule. Thus the court in *Wong Sun* emphasized the application of the exclusionary rule to protect the Fourth Amendment guarantees in two respects: deterring lawless conduct by federal officers, and "closing the doors of the federal courts to any use of evidence unconstitutionally obtained." *Wong Sun v. United States*, 371 U.S. 471, 486 (1963). *See also Brown v. Illinois*, 422 U.S. 590, 599 (1975). Decisions in this Court have repeatedly referred to "the imperative of judicial integrity." *Elkins v. United States*, 364 U.S. 206, 222 (1960); *Lee v. Florida*, 392 U.S. 378, 385, 386 (1968); *United States v. Peltier*, 422 U.S. 531, 537 (1975). In *Mapp v. Ohio*, in which the exclusionary rule was applied to the states, Justice Clark wrote:

> Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. 367 U.S. 643, 659 (1961).

The judicial integrity function of the exclusionary rule was again emphasized in *Terry v. Ohio* when Justice Warren wrote:

> Courts which sit under our constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by



> permitting unhindered governmental use of the fruits of such invasions. 392 U.S. 1, 13.

The judicial integrity of our courts would be tainted by admission of evidence seized after an unlawful arrest by police based upon misinformation in their own computer.

Exclusion of evidence in this case also serves the third purpose of the exclusionary rule: public perception of the courts. Use of illegally obtained evidence in the courtroom undermines public confidence in the judicial system.

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. Justice Brandeis dissenting in *Olmstead v. United States*, 277 U.S. 438, 485 (1928) as quoted by Justice Brennan in dissent in *United States v. Calandra*, 414 U.S. 338, 358 (1974).

In a nation increasingly concerned with crime, this third purpose, public perception and willingness to abide by the law, should become the first and primary focus because citizens who perceive that the courts and the authorities are not bound by the law will not feel bound by the law themselves.

Police officers and organizations should be directed to heed this Court's pronouncement in *Jeffers*:

> In so doing the Amendment does not place an unduly oppressive weight on law enforcement officers but merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficent purposes intended. *United States v. Jeffers*, 342 U.S. 48, 51 citing to *Johnson v. United States*.

### C. The *Leon* exception to the exclusionary rule does not apply.

*Leon* does not apply. In *Leon*, officers obtained evidence on the basis of a facially valid search warrant issued by a neutral magistrate. The warrant was later held invalid. As the Arizona Supreme Court noted: "Such a situation is distinguishable from one like this, where no warrant at all was in existence at the time of the arrest." (Pet. App. at 6a.) In *Leon*, the arresting officer acted in good faith reliance on a defective warrant. In *Evans*, there was no warrant on which the arresting officer could put his reliance. There was only an erroneous report from a police computer solely in the control of the police. The Arizona Supreme Court correctly excluded the evidence taken after the unlawful arrest holding:

> It is repugnant to the principles of a free society that a person should ever be taken into police custody because of a computer error precipitated by government carelessness. As automation increasingly invades modern life, the potential for Orwellian mischief grows. Under such circumstances, the exclusionary rule is a "cost" we cannot afford to be without. (Pet. App. at 10a.)



This case is not governed by *Leon*. As Justice O'Connor wrote in her dissent in *Illinois v. Krull*, 480 U.S. 340, 367 (1987): "*Leon* simply instructs courts that police officers may rely upon a facially valid search warrant." This Court's decisions in both *United States v. Leon* and its companion case, *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), concerned objectively reasonable reliance on a magistrate's warrant. Crucially, as was noted in *Sheppard*:

> An error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake. *Sheppard*, 468 U.S. 990.

By contrast, in this case, the judge made no mistake. When Evans appeared, the judge quashed the warrant. It was the police computer which made "the critical mistake." Therefore, our appellate courts have held that where police are not acting on a warrant, Leon is not applicable. *See U.S. v. Scales*, 903 F.2d 765 (10th Cir. 1990); *U.S. v. Curzi*, 867 F.2d 36 (1st Cir. 1989); *U.S. v. Windsor*, 846 F.2d 1569 (9th Cir. 1988); *U.S. v. Warner*, 843 F.2d 401 (9th Cir. 1988). *See also* 1 W. LaFave, *Search and Seizure* § 1.3(g), at 78 (2d ed. 1987).

Not only was there no warrant, defective or otherwise, to justify Evans' arrest and search, it was not objectively reasonable for police to rely on the report of a warrant given this casual, haphazard procedure for reporting quashed warrants. Police authorities who have the power to drag a citizen off the street and into a jail cell have the responsibility to ensure that they have the authority to do so. A citizen's liberty interest should not

depend upon a phone call or a computer entry; the arresting authority has the responsibility to provide a fail-safe mechanism for ensuring that warrantless arrests are not made on the basis of stale computer information.[2] This erroneous information remained in the police computer after the warrant had been quashed through no fault of Evans. It must be remembered that police computer information systems cannot be accessed by any individual or organization other than a criminal justice agency.[3] This privilege is jealously guarded by police officers, sheriffs, and the F.B.I. It is only reasonable to expect that police authorities, having taken this "dog-in-the-manger" approach, should be responsible for the manger. It is the responsibility of the police authority to update their records; such failure should not overcome a defendant's constitutional right to be free from unreasonable search and seizure. There is a growing problem with police reliance on criminal files recorded and disseminated electronically. *See, e.g., State v. Peterson,* 830 P.2d 854 (App. 1991) and cases cited therein[4] at 857. The good faith

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[2] That there exists a factual question as to who was responsible for failure to delete the warrant from the computer illustrates the fatal shortcomings of the procedure established by the police.

[3] By contrast, the individual citizen can obtain a printout of his TRW credit report and can submit corrections if the report is in error.

[4] *United States v. Mackey,* 387 F. Supp. 1121 (D. Nev. 1975); *People v. Ramirez,* 34 Cal. 3d 541, 194 Cal. Rptr. 454, 668 P.2d 761 (1983); *Pesci v. State,* 420 So. 2d 380 (Fla. App. 1982); *People v. Joseph,* 128 Ill. App. 3d 668, 83 Ill. Dec. 883, 470 N.E.2d 1303 (1984); *People v. Lawson,* 119 Ill. App. 3d 42, 74 Ill. Dec. 668, 456 N.E.2d 170 (1983); *People v. Decuir,* 84 Ill. App. 3d 531, 39 Ill. Dec.



exception of *Leon* is not applicable where a citizen is deprived of his liberty without any legal basis because of stale information in police computer records. *See People v. Joseph,* 470 N.E.2d 1303 (1984). There is simply no basis to extend the *Leon* good faith exception based upon a facially valid warrant issued by a magistrate to "facially valid" computer information issued by the police themselves. To do so would violate *Leon*'s insistence upon objective as opposed to subjective good faith.

### D. Exclusion is mandated by this Court's decisions in *Leon, Whiteley,* and *Hensley.*

Exclusion is the only proper resolution under this Court's decisions in *Leon, Whiteley, and Hensley.* In *Whiteley,* 401 U.S. 560 (1971), this Court held that a police bulletin did not provide probable cause for Whiteley's warrantless arrest. The sheriff's conclusory statements in the complaint upon which a warrant was issued were insufficient to support the independent judgment of a disinterested magistrate. Police officers arrested Whiteley based upon a radio bulletin calling for Whiteley's arrest. Just as the State argues in this case, in *Whiteley,* the state argued police reliance on the radio bulletin. The subjective reliance of the arresting officers was not sufficient. The court said:

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912, 405 N.E.2d 891 (1980); *People v. Jennings,* 54 N.Y. 2d 518, 446 N.Y.S.2d 229, 430 N.E.2d 1282 (1981); *People v. Watson,* 100 App. Div. 2d 452, 474 N.Y.S.2d 978 (1984); *People v. Lent,* 92 App. Div. 2d 941, 460 N.Y.S.2d 369 (1983); *State v. Trenidad,* 23 Wash. App. 418, 595 P.2d 957 (1979).

> Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.

The decision to exclude in *Whiteley* turned, therefore, on the fact that the *sheriff*, not the magistrate, was at fault. Here, the police computer was at fault. In 1984, the *Leon* court cited to *Whiteley* to make clear that there must be objective reasonableness not only on the part of officers who eventually execute a warrant but also on the part of officers who provide information for the probable cause determination. *United States v. Leon*, 468 U.S. at 923. Citing to *Franks v. Delaware*, 438 U.S. 154 (1978), the *Leon* court held that suppression is an appropriate remedy if the magistrate or judge in issuing the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. 468 U.S. at 923. Here, the officer's warrantless arrest of Evans was not objectively reasonable based as it was on a police computer information base recklessly or negligently maintained. It must be remembered that only a police authority could remove the warrant from the police computer once it had been entered. Justice court personnel could not access or change the police computer. In order to protect their



jealously guarded exclusive right to access their computer, the police authorities chose a system whereby justice court personnel would call the sheriff and the sheriff would access and correct the computer. It makes no difference whether the justice court personnel or the sheriff's personnel were at fault in deleting the warrant from the computer. The justice of the peace made no error; he quashed the warrant. The issue here is the accuracy of information in a police computer which can only be accessed by the police.

In 1985, this Court decided *United States v. Hensley*, 469 U.S. 221. In *Hensley*, police made an investigatory stop in reliance upon another police department's wanted flyer. This Court held that because the flyer was based upon articulable facts supporting a reasonable suspicion that the wanted person committed the offense, reliance on the flyer justified a stop. This Court was very clear, however, that if the flyer had been issued in the absence of reasonable suspicion, then a stop in objective reliance upon it violates the Fourth Amendment. 469 U.S. at 230. The court in *Hensley* held that *Whiteley* supports the proposition that admissibility turns on whether the officers who *issued* the flyer possess probable cause to make the arrest.[5] *Hensley* also suggests that the officers making the stop were not justified in a lengthy detention or arrest based on less than probable cause. 469 U.S. at 235. The *Hensley* court also cited to *Whiteley* in making clear that

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[5] *Hensley* demonstrates the difference between a police officer's good faith defense to civil suit where the flyer was issued without probable cause and violation of the Fourth Amendment requiring suppression in a criminal case.

officers should, of course, arrest when a bulletin or the radio so instructs them but that this arrest cannot be insulated from a challenge to the originating or instigating officer. 431 U.S. at 230. Amici's arguments that the officers were entitled to arrest are, therefore, beside the point.

Exclusion was the only proper decision where no warrant was extant to justify Evans' arrest.

## III. The Fourth Amendment's absolute prohibition against unreasonable searches and seizures demands a remedy which focuses on avoiding its violation.

In deciding whether to exclude evidence gathered in violation of constitutional mandates, earlier courts have discussed the Fourth Amendment's absolute proscription against unreasonable searches along with the Fifth Amendment's proscription against the use in court of compelled statements. In *Boyd v. United States*, 116 U.S. 616, 630 (1886), the court described the Fourth and Fifth Amendments as running "almost into each other." And in *Mapp*, in deciding to exclude, the court described "the close interrelationship between the Fourth and Fifth Amendments as they apply to this problem." 367 U.S. at 662. The court in *Mapp* at 647 noted *Boyd*'s pronouncement that "constitutional provisions for the security of person and property should be liberally construed" and that, in holding as it did, the *Boyd* court "gave life to Madison's prediction that the 'independent tribunals of



justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.' 1 Annals of Cong. 439 (1789)." *Mapp* 367 U.S. at 647.

By the time of this Court's decision in *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990), the court was noting that the Fourth Amendment operates differently from the Fifth in that it prohibits "unreasonable searches and seizures" whether or not used in court. The violation of the Fourth Amendment is "fully accomplished at the time of the governmental intrusion" whereas the violation of the Fifth Amendment takes place not when the statement is compelled but only later at trial.

Perhaps it is time to consider, then, that the framers of our constitution meant to give more protection from the police in the Fourth Amendment than in the Fifth. Our courts have held that police are free to question a citizen but, if they violate his right to remain silent, the statement given cannot, under the Fifth Amendment be used in court. It is for this reason that the *Miranda* warnings were fashioned in order to prevent a compelled statement (or violation of the Fifth Amendment) from happening. It may now be time for this Court to approach the Fourth Amendment as directly as it has the Fifth Amendment in *Miranda*, 384 U.S. 436 (1966). Exclusion of unconstitutionally seized evidence is, after all, merely a judicial remedy (*see United States v. Calandra*, 414 U.S. 338, 620 (1974)), a necessary band-aid which does not prevent the injury. In order to prevent an unreasonable search and

seizure from happening, this Court could fashion a preventive procedure just as it did in *Miranda*.[6] In this day and age of computers and mobile fax machines, the Fourth Amendment asks no more than this Court has provided in *Miranda*. If computers are to be utilized, then courts should require police to have a fax of a warrant if they are to have the power to arrest under its authority. Had the police who arrested Evans checked with the justice court and asked for a fax of the warrant, they would have learned that there was no longer a warrant in existence.[7]

The framers of our constitution envisioned an official document called a warrant to give police the authority from the court to arrest. This authority is too powerful

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[6] Any encounter with today's policeman is just that. The friendly Irish cop is gone from the beat replaced by the new centurion with an "us" (cops) and "them" (everybody else) attitude. Violations of constitutional rights are the norm with these new troopers; however, because there now exists only the exclusionary rule for redress, courts see only those violations involving "bad guys" in criminal matters.

[7] As an alternative procedure, entries into police information systems should be made by the clerks of the issuing court and the court clerks should be the ones to delete the warrant immediately at the time the magistrate quashes it. If police authorities are not to be held responsible for their own computers, then justice courts must have direct access to correct warrant information. An officer who checks back with his same computer, as did the officer in this case, does not ascertain whether the warrant is "valid," he merely confirms what the officer already knows: that the computer reflects (however erroneously) that a warrant is extant. The only way to check whether a warrant is truly valid is to check with the issuing judge or court.



and the freedom it concerns too precious to be entrusted to a computer byte. We require police to have a search warrant with them to give authority to search a home. A man's liberty deserves no less.

## CONCLUSION

The decision of the Arizona Supreme Court should be affirmed.

RESPECTFULLY SUBMITTED,

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